In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
a Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the Estate of
JAMES D. KROGER, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner, Owen Equipment and Erection Company, a Nebraska corporation, prays that a Writ of Certiorari issue to review the opinion and judgment of the Eighth Circuit Court of Appeals rendered in these proceedings on August 16, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported appears at Appendix A, infra, App. pp. 1-36. The Order denying Petition for Rehearing en banc by an evenly divided court is unreported and appears at Appendix B, infra, App. p. 37.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed June 21, 1977. See Appendix A, App. pp. 1-36, infra. Subsequent thereto a Petition for Rehearing, Motion to Expunge Portions of Opinion and Suggestion for Rehearing in Banc was timely filed on the 16th day of August, 1977. The Petition for Rehearing in Banc was denied *by an evenly divided court* (Appendix B). This Petition for Certiorari was filed less than ninety days from the date of the overruling of said Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Kroger, Respondent, alleged the amount in controversy exceeded $10,000.00. The trial court, however, never acquired subject matter jurisdiction of this action. The alleged basis of jurisdiction was diversity of citizenship. However, the Respondent and Owen Equipment and Erection Company, Petitioner, were both citizens of Iowa at the time of the filing of the complaint.

QUESTIONS PRESENTED

Geraldine Kroger, Administratrix of the Estate of James D. Kroger, Deceased, brought an action for damages for the wrongful death of Respondent's decedent. The action was originally brought against the Omaha Public Power District and Paxton-Vierling Steel Company. The

Omaha Public Power District then filed a third party complaint against the Petitioner. The Respondent then brought an amended third party complaint naming the Petitioner as a defendant.

Paxton-Vierling Steel Company and the Omaha Public Power District were both dismissed out of the suit leaving as party plaintiff, Geraldine Kroger an Iowa citizen and as party defendant, Owen Equipment and Erection Company, a Nebraska corporation having its principal place of business in Carter Lake, Iowa, therefore being a citizen of Iowa.

The petitioner then filed a Motion to Dismiss or in the Alternative for Directed Verdict claiming that the Court did not have jurisdiction of the subject matter of the action. But the trial court overruled the Motion to Dismiss claiming the Court acquired power to hear the whole matter under *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966). The United States Court of Appeals for the Eighth Circuit affirmed that judgment. The questions thereby arising are:

1. Whether the Trial Court acquired power to decide the claim of the respondent against Petitioner.

2. Whether the Trial Court could exercise its discretion to create jurisdiction where none, in fact, existed.

3. Whether the United States Court of Appeals for the Eighth Circuit erred in making findings of fact that Petitioner intentionally concealed its principal place of business without giving Petitioner and its counsel a hearing on that issue in violation of the Fifth Amendment of the United States Constitution.

4. Whether the Trial Court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for that plaintiff to assert a claim against the third-party defendant.

5. Whether the Trial Court erred in finding that jurisdiction existed between Respondent and Petitioner (citizens of the same state) in Federal Court where no federal question was presented and the main cause of action between Respondent and the defendant Omaha Public Power District (citizens of different states) had been dismissed prior to trial at request of defendant Omaha Public Power District.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. § 1332(a):

§ 1332. *Diversity of citizenship; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Fed. R. Civ. P. 8(b):

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each

claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 12(h)(3):

(3) Whenever it appears by suggestion of the parties or othewise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 14:

(a) *When Defendant may Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party com-

plaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

Fifth Amendment to the United States Constitution:

> No peson shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

Respondent's decedent, James D. Kroger, was an employee of Paxton & Vierling Steel (C. A. Appendix II, pp. 16, 17).* On the 18th day of January, 1972 at the request of a supervisor employed by Paxton & Vierling Steel, respondent's decedent assisted other Paxton & Vierling employees in moving a large steel air tank (C. A. Appendix II, p. 16). The steel air tank was obstructing construction activity at a construction site within the Paxton & Vierling Building (C. A. Appendix II, p. 179).

Lloyd Feller, an executive vice-president of operations of Paxton & Vierling Steel, gave the original order to move the steel air tank (C. A. Appendix II, p. 179). That order was passed down to Mr. Clem Rosemaric, respondent's decedent's immediate supervisor (C. A. Appendix II, pp. 179, 180).

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*Reference is to Appendices used on appeal before United States Court of Appeals for the 8th Circuit.

A large Lorraine crane was being used to move the tank. The crane was mounted on a truck which could move about inside the Paxton & Vierling Building (C. A. Appendix II, p. 3).

A steel cable ran from the boom of the crane to the chains which were wrapped around the air tank (C. A. Appendix II, p. 19). Respondent's decedent was standing on the ground next to the steel tank assisting in steadying the tank as the crane moved from the construction site to the west end of the building (C. A. Appendix II, p. 20). When the crane reached the west end of the building and could go no further, the boom was raised so that the tank could be lowered (C. A. Appendix II, pp. 20, 21). Respondent's decedent was still standing near the air tank (C. A. Appendix II, p. 23). As the boom of the crane was lifted, it came in close proximity to overhead power lines and an arc of electrical current jumped from the air tank into the body of respondent's decedent, causing his death by electrocution (C. A. Appendix II, p. 9).

On the 24th day of November, 1972, respondent filed her complaint in the United States District Court for the District of Nebraska, claiming damages sustained as a result of the wrongful death of James D. Kroger (C. A. Appendix I, p. 4). The action was brought against Omaha Public Power District and Paxton & Vierling Steel Company (C. A. Appendix I, p. 4). Both Paxton & Vierling Steel and Omaha Public Power District filed motions to dismiss (C. A. Appendix I, pp. 12, 18). Paxton & Vierling Steel Company was dismissed out because of a jurisdictional defect. Omaha Public Power District then brought a third-party complaint against Paxton & Vierling

Steel Company and Owen Construction Company, Inc. claiming that both said third-party defendants were liable to the Omaha Public Power Company for any sums which respondent would recover from OPPD on her complaint (C. A. Appendix I, p. 7).

The third-party plaintiff was then granted permission to file an amended third-party complaint naming Owen Equipment and Erection Company, a Nebraska corporation, as an additional third-party defendant and dismissing Owen Construction Company, Inc., an Iowa corporation, from the third-party complaint (C. A. Appendix I, pp. 13, 14).

A motion to dismiss was then filed on behalf of Paxton & Vierling Steel Company claiming that the complaint failed to state a claim upon which relief could be granted (C. A. Appendix I, p. 18). Owen Equipment and Erection Company filed its answer (C. A. Appendix I, p. 19). Respondent was then granted leave to file amended pleadings adding Owen Equipment and Erection Company as a party defendant (C. A. Appendix I, p. 23). The amended complaint was then filed on November 9, 1973, naming Owen Equipment and Erection Company as a party defendant (C. A. Appendix I, p. 23). Owen Equipment and Erection Company then filed its answer to the plaintiff's amended complaint (C. A. Appendix I, p. 31). The trial court then granted Omaha Public Power District's motion for summary judgment and dismissed it from the lawsuit (C. A. Appendix I, p. 39). The United States Court of Appeals for the Eighth Circuit sustained that order of the trial court (C. A. Appendix I, p. 42).

Petitioner also filed a motion for summary judgment (C. A. Appendix I, p. 40). However, that motion was subsequently overruled. Petitioner then filed an additional answer to the plaintiff's amended complaint alleging that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action (C. A. Appendix I, pp. 53, 54).

The basis for Petitioner's claim that the United States District Court for the District of Nebraska lacked jurisdiction of the subject matter of the action was that since the Respondent and the Petitioner were both citizens of the State of Iowa there was no diversity of citizenship and thus no independent basis of jurisdiction. Petitioner claimed that before a plaintiff could assert a claim against a third-party defendant in the same action an independent basis of federal jurisdiction was required.

Trial of this matter commenced on the 13th day of January, 1976 (C. A. Appendix I, p. 51).

The jury returned a verdict in favor of the respondent and against petitioner for $234,756.00 and that verdict was reduced to judgment by the Clerk of the Court (C. A. Appendix I, p. 84). The Court filed its memorandum and order overruling petitioner's motion to dismiss for lack of subject matter jurisdiction (C. A. Appendix I, p. 87).

The trial court conceded in that memorandum (C. A. Appendix I, p. 85) that:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has

> its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. *Hence, an independent basis of jurisdiction does not exist.*" (C. A. Appendix I, pp. 85, 86). (Emphasis added.)

The trial court, however, went on to hold as follows:

> "The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> Properly read, *United Mine Workers* [*v. Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27 [1], 14-569 to 14-570.
>
> This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this 'pendant' claim.[1] Defendant waited until trial to pre-

1 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context.

sent its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction."

(C. A., Appendix I, p. 86.)

Petitioner filed its motion for judgment notwithstanding the verdict (C. A., Appendix I, p. 87) and motion for new trial (C. A., Appendix I, p. 88), both of which were denied by order of the Court (C. A., Appendix I, p. 124). Petitioner then filed its notice of appeal, perfecting its appeal to the United States Court of Appeals for the Eighth Circuit (C. A., Appendix I, p. 125).

Among the issues presented on review to the United States Court of Appeals for the Eighth Circuit were:

1. Whether the trial court erred in holding that an independent basis of jurisdiction need not exist between a plaintiff and a third-party defendant in order for the plaintiff to assert a claim against that third-party defendant?

2. Whether the trial court erred in finding that jurisdiction existed between respondent and petitioner (citizens of the same state) in federal court where no federal questions were presented and the main cause of action between respondent and the defendant OPPD (citizens of

different states) had been dismissed prior to trial at defendant OPPD's request.

The Appellate Court found:

". . . In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered." (Appendix A, App. p. 21).

The Court went on to hold:

"But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.

"But plaintiff overlooks the application of the *Gibbs* doctrine to ancillary the litigation. The District Court had judicial *power* over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused or not in its retention of the cause, defendant's conduct estops it from asserting abusive discretion, not only that under the teachings of Murphy v. Kodz, supra, but also under the most elementary considerations of judicial fairness. 'Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the fil-

ing of the amended complaint. No reason for the delay has been offered. . . .'

The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct." (Appendix A, App. p. 22).

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the decision of the Fourth Circuit Court of Appeals in the case of Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc., 512 F. 2d 890 (4th Cir. 1972).

There is no dispute that had the respondent originally sued Owen Equipment & Erection Company, Inc., there would be no diversity of citizenship and thus, no jurisdiction. However, the trial court held that under "the law in Nebraska", a plaintiff may assert a claim against the third-party defendant without an independent basis of jurisdiction. As authority for its holding, the trial court cited cases of *Union Bank & Trust Co. v. St. Paul Fire & Marine Insurance Co.*, 38 F. R. D. 46 (D. Neb., 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb., 1965); and *United Mine Workers of America v. Gibbs*, 383 U. S. 715 (1966).

The first case cited hereinabove does not serve as authority for the Trial Court's holding, for in that case, a claim was made by a third-party defendant against the plaintiff and it was decided that no independent jurisdictional base was required. This is, of course, substantially different than the instant matter where a plaintiff is making a claim against the third-party defendant. This distinction was pointed out in the case of *Rivera Copper & Brass v. Aetna Casualty Co.*, 426 F. 2d 709, 12 A. L. R. Fed. 389 (5th Cir., 1970). Therein, the Fifth Circuit Court of Appeals stated:

> "A cursory review of the joinder situations to which ancillary jurisdiction is applied reveals that generally, it is made available to litigants in a defensive posture, who would otherwise be prevented or greatly burdened in adequately protecting their interests. There is much to be said for allowing parties who are involuntarily brought into federal court to defendant against a claim or who must be allowed to intervene in a federal action as a defendant to secure their interests, to assert all their claims arising out of the controversy in one proceeding and as this is, or ought to be, one of the factors to be considered in determining the existence of ancillary jurisdiction. . . .
>
> "Echoing Professor Moore, Revere argues that since there must be an independent ground of jurisdiction to support the original plaintiff's claim against a third-party defendant, the same requirement must be met by the third-party defendant in asserting a counterclaim against the original plaintiff. *Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all.* Since the plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly by way of a fortuitous impleader. Moreover, there is possibility, whether real or fanciful, or

collusion between the plaintiff and an overly cooperative defendant impleading just the right third party." (Emphasis added.)

The differences are obvious. The Respondent here selected the forum, Petitioner did not.

The trial court cited as further authority for its holding that the law in Nebraska is that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against the third-party defendant the case of *Olson v. United States,* supra. In that case, Judge Van Pelt chose to follow the minority rule and hold that an independent basis of jurisdiction need not exist before a plaintiff can assert a claim against a third-party defendant. It must be emphasized, however, that this minority stand has been taken by a very limited number of courts that have addressed the issue. Other cases which have commented on *Olson* have never followed this decision, but have only criticized it.

In *Kenrose Manufacturing Co. v. Fred Whitaker Co.,* 53 F. R. D. 491 (1971), the United States District Court for the Western District of Virginia stated:

> "On the other hand, there are a few cases which would not require the plaintiff to have an independent basis of jurisdiction in order to amend his complaint to include a third-party defendant with the same citizenship. *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. Neb. 1965). These cases regard a plaintiff's claim against a third-party defendant as ancillary to the original action. In *Buresch,* supra, Judge Gourley, Chief Judge of the Western District of Pennsylvania, felt that to deny ancillary jurisdiction in a case similar to the one at bar would defeat the purpose of avoiding multiplicity of suits and

piecemeal litigation. In *Olson,* supra, Judge Van Pelt of the District Court of Nebraska stated that the fact that there may be collusion in some cases should not prevent plaintiffs from asserting their complaints against the third-party defendants in all cases. This minority view favoring expansion of ancillary jurisdiction to cover the situation at bar also has apparent support from some legal writers. See 6 Wright & Miller, Federal Practice and Procedure § 1444, p. 232 (1971); *Fraser,* supra, 33 F. R. D. at 41-43; *Holtzoff,* supra, 31 F. R. D. at 110.

> "It should be noted, however, that there is still much disagreement on this point. For example, the *Buresch* decision originated from the Western District of Pennsylvania in 1968. Subsequent to that date two cases decided in that same district have rejected the view that no independent basis of jurisdiction is required. *Schwab v. Erie Lackawanna Railroad,* 303 F. Supp. 1398 (W. D. Pa., 1969); *Ayoub v. Helm's Express, Inc.,* 300 F. Supp. 473 (W. D. Pa. 1969) (Judge Weber, District Judge, Decided Both Cases)."

The *Kenrose Manufacturing Co. case* was appealed to the Court of Appeals for the Fourth Circuit. That appeal appears at 512 F. 2d 890 (4th Cir. 1972). That Court cited four cases as following the minority view. Those cases were: *Buresch v. American LaFrance,* 290 F. Supp. 265 (W. D. Pa., 1968); *Olson v. United States,* 38 F. R. D. 489 (D. C. Neb., 1965); *Myer v. Lyford,* 2 F. R. D. 507 (M. D. Pa., 1942); and *Skylar v. Hays,* 1 F. R. D. 594 (E. D. Pa., 1941). In discussing those cases that Court stated:

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks to

avoid is available without question in the state courts. The majority view, as outlined above, has its own valid supporting reasons and we fail to discern any movement away from the well-established rule, which is directly contrary to appellant's contention.

"It is true that four lower court cases have favored appellant's view. However, not only are these in the minority among the decided cases, but they have been far from convincing to other judges in the very jurisdictions where they were rendered."

In a footnote discussing how other judges have rejected the minority view, the Court stated:

"For example, subsequent to the *Buresch* case, cited in note 9, two decisions issuing from the same court specifically rejected *Buresch*. See *Schwab v. Erie Lackawanna R. R.*, 303 F. Supp. 1398 (W. D. Pa. 1969), and *Ayoub v. Helm's Express, Inc.*, 300 F. Supp. 473 (W. D. Pa. 1969). In *Ayoub*, the Court said:

"'There is no diversity of citizenship between the plaintiff and the present third-party defendant against whom plaintiff wishes to assert a direct claim. The great weight of authority requires that there be diversity of citizenship between such parties. Although such a claim was allowed to be asserted in *Buresch* • • • I do not believe that this opinion represents the view of a majority of the members of this District Court or the view of the majority of the federal courts.'"

In the case of *Palumbo v. Western Maryland Railway Company*, 271 F. Supp. 361 (1967), Chief Judge Thomsen of the United States District Court for the District of Maryland, commented on Judge Van Pelt's holding in *Olson v. United States* in light of the comments of the Advisory Committee on the Federal Rules of Civil Procedure and existing case law. Judge Thomsen stated:

"When Rule 14 was first adopted, Professor Moore expressed the opinion that independent grounds of jurisdiction would be required to support a plaintiff's claim against a third-party defendant, and most of the courts have taken that view. See 3A Moore's Federal Practice, 2d ed., p. 24.27 (I) and cases cited therein. In Friend v. Middle Atlantic Transp. Co., 153 F. 2d 778 (2d Cir. 1946), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 1635, Judge Clark, speaking for the Second Circuit (as well as out of his experience as Chairman of the Advisory Committee on Rules) said:

"'May a defendant cause a third party to be brought into a federal civil action under Federal Rules of Civil Procedure, Rule 14, 28 U. S. C. A. following section 723c, to answer, along with it, to the plaintiff's claim, where the plaintiff and such party are citizens of the same state and federal jurisdiction does not otherwise appear? That is the issue squarely presented here, and we think it must be answered in the negative. Notwithstanding the undoubted convenience of extensive joinder in cases such as this, we must observe the established boundaries of federal jurisdiction, which the rules do not enlarge. F. R. 82.' 153 F. 2d at 779.

"When Rule 14 was amended in 1948, the Advisory Committee noted that 'in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. The note referred to a number of cases and commentators. Since the amendment, the weight of authority has continued to require independent grounds of jurisdiction for such a claim. Moore, op. cit., p. 14.17 (1).

"Judge Van Pelt assembled all the arguments to the contrary in his opinion in Olson v. United States, 38 F. R. D. 489, 490 (D. Neb. 1965), and refuses to follow the majority view. He noted that some courts have expressed 'the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of a third-party practice.' Fear of collusion is not the principal argument supporting the majority rule. Wherever the law provides for contribution among joint tortfeasors, or a defendant has a possible claim for indemnity, the defendant will ordinarily file a third-party complaint, giving plaintiff the opportunity to assert a claim against the third-party defendant.

"The principal reason for the majority rule was tersely stated in McPherson v. Hoffman, 275 F. 2d 466 (6 Cir. 1960), as follows:

> "'Under the Federal Employers' Liability Act the plaintiff could bring his action against the railroad in Federal Court without diversity of citizenship. Section 56, Title 45, U. S. C. A. He could not have sued the McPhersons in Federal Court separately nor could he have joined them with Chesapeake and Ohio because there was no diversity of citizenship between him and the McPhersons, Section 1332, Title 28, U. S. C. What he could not do directly could not be done for him indirectly. The court did not have jurisdiction to enter a judgment against third-parties defendant in favor of the plaintiff Hoffman. Jurisdiction cannot be waived.' 275 F. 2d at 470."

Moreover, in one of its prior decisions the 8th Circuit chose to follow the majority rule and hold contrary to the ruling of Judge Van Pelt in *Olson v. United States*, supra.

In the case of *United States v. Lushbough*, 200 F. 2d 77 (8th Cir. 1951), plaintiff Lushbough brought an action

under the Federal Tort Claims Act against the United States for damages he sustained in an automobile collision. The United States impleaded Hoffman as a third-party defendant, stating he was liable over to the United States for any judgment Lushbough might obtain against it. The District Court found that Hoffman's negligence was the cause of the collision and entered a judgment in favor of the plaintiff Lushbough against the United States and against Hoffman in the sum of $50,000.00. The District Court also awarded judgment against Hoffman on the third-party complaint of the United States. Both the United States and Hoffman appealed from the judgment in favor of Lushbough. This Court in reversing the judgment in favor of Lushbough against Hoffman stated:

> "We think the judgment against Hoffman in favor of Lushbough must also be reversed. Lushbough brought no action against Hoffman, asked for no judgment against him. Rule 14(A) of the Rules of Civil Procedure, 28 U. S. C. provides that: 'The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.' Lushbough asserted no claim against Hoffman. But, conceding for the argument that such an assertion was a formality not required under the Federal Rules of Civil Procedure, Lushbough's right to maintain a claim against Hoffman is prohibited by 28 U. S. C., Section 2676, which provides:
>
> > "'The judgment in an action under Section 1346(B) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.'

"The District Court, having awarded a judgment in favor of Lushbough in his action against the United States, could not in the face of the explicit provisions of the Act order judgment against Hoffman in favor of Lushbough in the same action. Prechtl v. United States, D. D. 84 F. Supp. 889, 890; Lauterbach v. United States, D. C. 95 F. Supp. 479, 482. *Nor is there any showing in the evidence of the necessary diversity of citizenship as between Lushbough and Hoffman.* Since the reversal of the judgment against the United States carries with it the reversal of the judgment for the United States against Hoffman, it is unnecessary to consider Hoffman's contention that the United States could not implead Hoffman as a third-party defendant in the action." (Emphasis added.)

In *Kenrose Manufacturing Co. v. Fred Whitaker Co., supra,* the United States Court of Appeals for the Fourth Circuit set forth the majority view on the subject, stating:

> "Rule 14 of the Federal Rules of Civil Procedure governs third-party practice and it has indeed been held under that rule that, where there is diversity as between plaintiff and defendant, defendant may implead a third party of the same citizenship as the plaintiff. In such case, it may be said that ancillary jurisdiction confers power upon the court over the third-party action.
>
> "Rule 14 also contains language permitting a plaintiff to
>
> > Assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
>
> There is, however, no indication in the rule whether a basis of jurisdiction independent of the main action

must be alleged to support plaintiff's claim against the third-party defendant. Where jurisdiction does not otherwise appear, mere permission, in the rules, to assert a claim, does not itself confer jurisdiction over that claim. By express provision the rules are not to be read as a source of jurisdiction. See Rule 82. To illuminate this point, we must necessarily look elsewhere.

"Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim. See, e. g., Stemler v. Burke, 344 F. 2d 393, 395-396 (6th Cir. 1965); McPherson v. Hoffman, 275 F. 2d 466, 470 (6th Cir. 1960); Patton v. B & O R. R. Co., 197 F. 2d 732, 743 (3rd Cir. 1952); *United States v. Lushbough*, 200 F. 2d 717, 721-722 (8th Cir. 1952); Friend v. Middle Atlantic Transportation Co., 153 F. 2d 778, 779-780 (2nd Cir.), cert. denied, 328 U. S. 865, 66 S. Ct. 1370, 90 L. Ed. 2d 1635 (1946); Corbi v. United States, 298 F. Supp. 521 (D. C. Pa. 1969); Palumbo v. W. Md. Ry. Co., 271 F. Supp. 361 (D. C. Md. 1967).

"Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule prevents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should

not reach out for state law based litigation." (Emphasis added.)

Even Judge Van Pelt acknowledged the ruling of the majority, yet for some reason failed to follow it. He stated:

> "A number of courts have been impressed with the fact that by not requiring diversity, the plaintiff could assert a claim against a party whom he could not have sued directly in the federal courts without independent jurisdictional grounds. David Crystal, Inc. v. Cunard S. S. Co., 223 F. Supp. 273 (S. D. N. Y. 1963); LaChance v. Service Trucking Co., 208 F. Supp. 656 (D. Maryland 1962); Pasternack v. Dalo, 17 F. R. D. 420 (W. D. Pa. 1955); Welder v. Washington Temperance Ass'n, 16 F. R. D. 18 (D. Minn. 1954); (Dictum) *United States v. Lushbough,* 200 F. 2d 717, 721 (8th Cir. 1952); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E. D. N. Y. 1941). The same decisions express the danger of collusion between the original parties thereby enabling a plaintiff to assert a claim against a co-citizen in the federal courts through the use of third party practice." (Emphasis added.)

The trial court in its Memorandum addressed to the defendant's motion to dismiss for lack of subject matter jurisdiction (C. A. Appendix I, p. 85), stated that the rule that an independent basis of jurisdiction need not exist in order for the plaintiff to assert a claim against a third party was once a minority view, but that the trial court believed it to be correct.

Petitioner emphasizes that this still clearly remains the minority view. No court of appeals in any circuit in the Federal Judicial System has ever followed the minority view, and, in fact, those addressing the issue have criticized and dismissed the minority view as being

contrary to the intent and purpose of the Federal Rules and certainly, contrary to the comments of the Advisory Committee concerning Rule 14.

Other district courts sitting in the Eighth Circuit have chosen to follow the majority rule. For example, in *Welder v. Washington Temperance Association,* 16 F. D. R. 18 (1954), the United States District Court for the Division of Minnesota, Second Division, stated:

> "The interpleading of the third-party defendant brought in the plaintiff's amended complaint places residents of Minnesota on both sides of the case, thereby destroying the basis of this court's jurisdiction.
>
> "Rule 14 of the Federal Rules of Civil Procedure, 28 U. S. C. A., was intended to avoid delay and multiplicity of actions and should be liberally construed, but not to the extent of permitting such construction to extend the jurisdiction of the court. What plaintiff proposed to accomplish by his amended complaint was in effect to substitute another cause of action for that originally commenced by him. This he cannot do."

2. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the pronouncement of this Court in United Mine Workers of America v. Gibbs, 86 S. Ct. 1130, 383 U. S. 715 (1966).

But even if it be assumed that the minority view is correct, the jurisdictional limit of a federal district court

had never been extended to that which it has in the present action. The trial court acknowledged that:

> "This case is nevertheless novel, in that the third-party plaintiff was dismissed." (C. A. Appendix I, p. 85).

The holding of the trial court in this matter is likewise novel in finding that jurisdiction existed between citizens of the same state in the Federal Court, where no federal question was presented and the main cause of action between plaintiff and defendant, OPPD, had been dismissed prior to trial at defendant's request. Prior to the trial court's decision, jurisdiction has never been allowed to exist in a similar situation. The trial court stated:

> "However, having determined that ancillary jurisdiction exists, it is only equitable that the court now retain jurisdiction of this 'pendent' claim." (C. A. Appendix I, p. 86).

In *Kenrose Manufacturing Co. v. Fred Whittaker Co.*, 53 F. R. D. 491 (1971), the plaintiff attempted to make a claim against the third party defendant. The Court stated:

> "This court agrees with the majority view that when plaintiff amends his complaint to assert a direct claim against a third-party defendant of the same citizenship as plaintiff, there no longer exists diversity with regard to the main action. Furthermore, this court feels that diversity existing between an original plaintiff and a defendant is required to support any claims based on ancillary jurisdiction. Since that diversity was destroyed when the plaintiff amended his complaint to assert a claim against a co-citizen there no longer exists a basis for utilizing ancillary jurisdiction."

The Court in *Kenrose* then emphasized the distinction between the case which was before it and the cases following the minority views stating:

> *"Furthermore, in the case at bar, the third-party plaintiff has voluntarily moved to dismiss his third-party complaint against Kilodyne. This court is of the opinion that this factor distinguishes this case from the cases following the minority view, in that, in those cases the third-party complaint was not withdrawn but remained in the action.* By analogy, this court finds that the principle laid down in the case of State of Maryland to Use and Ben. of Wood v. Robinson, 74 F. Supp. 279 (D. Md., 1947), applies to the case at bar. *Robinson,* supra, involved an action by Virginia plaintiffs and the Maryland defendant, parties to the main action, settled their dispute out of court. Afterwards, the third-party defendants filed a motion to dismiss the third-party complaint for lack of diversity of jurisdiction. The Court, in granting that motion, rejected the general proposition that once jurisdiction properly attaches, it will not ordinarily be defeated by changes in situation.
>
> "In the case at bar, this Court feels that the same principles should apply. *Since the third-party plaintiff has voluntarily moved for a dismissal of its claim against the third-party defendant, and that motion has been granted, the basis for allowing a direct complaint by the plaintiffs against Kilodyne, without an independent basis of jurisdiction, no longer exists.* That third-party complaint was the only foundation upon which the plaintiff could, relying on the minority view, support his claim that no independent basis of jurisdiction is necessary. For the above reasons, this Court feels that it is without jurisdiction to decide the plaintiff's amended complaint against Kilodyne, Inc." (Emphasis added.)

In the case of *Municipal Leasing System, Inc. v. Northampton National Bank of Easton,* 382 F. Supp. 968

(1974), the United States District Court for the Eastern District of Pennsylvania, Judge VanArtsdalen stated:

> "Count IV 'alleges liability and seeks relief pursuant to the ancillary jurisdiction' of the court. In plaintiff's brief, it is conceded that this count, depending on ancillary jurisdiction is only maintainable if there is some independent basis for federal jurisdiction arising out of one or more of the other counts. The count apparently charges that the defendant bank improperly made charges against plaintiff's bank account, refused to honor certain checks drawn against the account and in other ways 'mishandled' plaintiff's bank account. This is purely a matter for state court determination. There being no diversity jurisdictional basis, *and in view of the dismissal of all other counts,* this cause of action must likewise fall." (Emphasis added.)

In the case of *Andrews v. Central Surety Insurance Company,* 295 F. Supp. 1223 (1969), the United States District Court for the District of South Carolina, Judge Simons, stated:

> "The ancillary jurisdiction of the federal courts recognized by the foregoing authorities would not extend to a situation *where the main suit had been fully concluded and there were no assets actually or constructively within the court's possession and control as a result of the principal suit.* Such was the case in Bounougias v. Peters, 369 F. 2d 247 (7th Cir. 1966). In that case the original tort action filed and tried in the federal district court in connection with Bounougias' injuries had been completely terminated and its judgment satisfied and all funds distributed before the attorney's suit for his fee was commenced. The court held under such circumstances that the district court had no jurisdiction since 'the district court had no property connected with this litigation in its custody or control.'" (Emphasis added.)

In denying Petitioner's motion for dismissal on the basis of lack of subject matter jurisdiction, the trial court also relied on the case of *United Mine Workers of America v. Gibbs,* 86 S. Ct. 1130, 383 U. S. 715 (1966). The trial court quoted from Moore's Federal Practice, stating:

> "Properly read, *United Mine Workers* [*v. Gibbs,* 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case,* i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570."

However, in *Gibbs* this Court was dealing with pendent jurisdiction and not with the question of ancillary jurisdiction. But the approach of this Court in that case is indeed pertinent to the plea of the petitioner in this action. It is true that in *Gibbs* this Court stated that if the federal and state claims "derive from a common nucleus of operative fact". If the plaintiff would ordinarily be expected to try all of his claims in one judicial proceeding; and, if the federal issues are substantial in character, then there is power in the federal court to hear all claims. The *Gibbs* opinion indicated, however, that such power is not required to be exercised in every case even though it is found to be in existence. Therefore, pendent jurisdiction is a "doctrine of discretion not of plaintiff's right." This Court then stated:

> "Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if

> these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply State law to them, *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, but procuring for them a surer-footed reading of applicable law. *Certainly, if the Federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."* (Emphasis Added.)

This statement has been consistently construed to limit the discretion of the district court.

In the recent case of *Gibson v. First Federal Savings & Loan Association of Detroit,* 504 F. 2d 826 (1974), the United States Court of Appeals for the Sixth Circuit rigidly applied this Supreme Court mandate. The Court stated therein:

> "In the absence of a substantial federal claim related to asserted state claims in such a way that the entire case may properly be deemed one 'case', federal courts do not have jurisdiction over purely state claims. *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 725, 86 S. Ct. 59, 15 L. Ed. 2d 58 (1966). *Dismissal of all federal claims before trial requires dismissal of state claims as well.* Id. at 726, 86 S. Ct. 59. A state court is the proper forum for adjudication of issues of general law, particularly where questions of fiduciary relationships are involved." (Emphasis added.)

See also *Kurtz v. State of Michigan,* 548 F. 2d 172 (6th Cir. 1977) wherein the Court stated:

> "Since all portions of the claims in this cause of action which arise under federal law have now been dismissed, the state law claims are no longer pendant

> and must be dismissed likewise. See United Mine Workers v. Gibbs . . ."

and, *Hodge v. Mountain States Tel. & Tel. Co.,* 555 F. 2d 254 (9th Cir. 1977), wherein the Ninth Circuit Court stated:

> "When a district court dismisses all federal claims prior to trial, it should not retain jurisdiction over pendant state claims."

The Eighth Circuit, however, claims dismissal of the federal claims prior to trial "is but one factor, among many others, to be considered" by the Court in exercising its discretion to retain jurisdiction of state law claims.

If, as the Court in Kenrose stated, the dismissal prior to trial of the Defendant with whom an independent basis of jurisdiction existed does distinguish those cases following the minority view from those adhering to the majority view it is then of great import to note that the Defendant OPPD was not dismissed from this action until October 1, 1975 (C. A. Appendix I, p. 42) after the statute of limitations had run. Petitioner certainly could not control the dismissal of the Defendant OPPD by the trial court and could not insist that OPPD be dismissed prior to the running of the statute of limitations, so that it could assert its claim that no independent basis of jurisdiction existed between respondent and petitioner based on the distinction of *Kenrose.*

3. The decision of the United States Court of Appeals for the Eighth Circuit directly conflicts with the pronouncement of this Court in Aldinger v. Howard, 96 S. Ct. 2413 (1976).

In *Aldinger v. Howard*, 96 S. Ct. 2413 (1976), this Court addressed the question of whether a plaintiff who asserted a claim against one defendant could implead a different defendant on a state law claim where there is no independent basis of federal jurisdiction, merely because the claim of the plaintiff against both defendants "derived from a common nucleus of operative fact."

In an opinion by Mr. Justice Renquist, this Court stated:

> "The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. *But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.' Ibid.* True, the same considerations of judicial economy would be served insofar as plaintiff's claims 'are such that he would ordinarily be expected to try them all in one judicial proceeding . . .' Ibid. *But the addition of a completely new party would run counter to the well-established princi'e that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.* We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, 512 F. 2d 890, 894 (C. A. 4, 1972):
>
> "'The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence of absence of jurisdiction. Especially is this true where as here the efficiency plaintiff seeks so avidly is available without question in the state courts.'" (Emphasis added.)

This Court quoted with approval the language of Judge Sobeloff in *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.*, supra. That case was cited extensively by appellant in its original brief filed herein. This Court emphasized that "the addition of a completely new party would run counter to the well-established principle that federal courts as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by the Congress." In the words of Judge Sobeloff in the *Kenrose Mfg. Co., Inc.* case, "the efficiency the plaintiff seeks so avidly is available without question in the state courts."

Aldinger holds that where jurisdiction is based not on diversity of citizenship but on a federal statute otherwise conferring jurisdiction over the subject matter, a claim based on state law against an entirely different defendant over which there is no independent basis of federal jurisdiction will only be allowed where the Court satisfies itself (1) that Art. III of the United States Constitution permits it and (2) that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." But jurisdiction does

not exist in a factual situation such as that which is before the Court in the instant matter. It is stated in *Aldinger*:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of the state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derived from a common nucleus of operative fact.'"

This Court then emphasized:

> "That the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress."

This is especially so where the plaintiff may seek his remedy in the state court. In the instant matter, respondent's remedy was available in the state court. There was no jurisdiction.

In the case of *Fawvor v. Texaco, Inc.*, 546 F. 2d 636 (5th Cir. 1977) the Fifth Circuit Court of Appeals construed the case of *Aldinger v. Howard*, supra. Relying on that decision plus the decision of the Fourth Circuit in *Kenrose Manufacturing Company, Inc. v. Fred Whitaker Co., Inc.*, supra, the court stated:

> "The authorities and cases cited above convince this Court that an independent ground of jurisdiction is necessary in order to support plaintiff's claim against the third-party defendant. No questions of federal law are involved in either the original action or in plaintiff's action against the third-party defendant. The basis of jurisdiction in the original complaint is diversity, but no diversity exists between the plaintiff and the third-party defendant. Neither is there any other basis for the federal court's assertion of jurisdiction over plaintiff's direct claim against the third-party defendant. This is not a situation where the same plaintiff and defendant seek to join a state claim with a federal claim. Although it is true that the defendant-third-party plaintiff has already brought in the third-party defendant, the defendant-third-party plaintiff had no choice as to forum, and neither did the third-party defendant. Not only did plaintiff have its choice of forum, but in fact it could and did file the same action in state court. The Constitution, statutes, rules of procedure, judicial precedent and public policy dictate that this Court not broaden the jurisdiction of the federal courts any more than that clearly permitted by law. Therefore, this Court concludes that an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant."

The decision of the Eighth Circuit in the instant matter most certainly conflicts with this decision of the Fifth Circuit in *Fawvor v. Texaco, Inc.*, supra.

4. The finding of fact made by the Eighth Circuit Court of Appeals violates petitioner's rights under the Fifth Amendment to the United States Constitution.

Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit in its opinion

filed June 21, 1977, made findings of fact which are not supported by the record on appeal. The court misapprehended several points of law which are in direct conflict with the decisions of other circuits and decisions of this Court.

A finding was made concerning the conduct of petitioner when that issue was never before the trial court. The appellate court so concluded without giving petitioner an opportunity to introduce evidence at a properly conducted hearing, in violation of the due process clause of the 5th Amendment of the United States Constitution.

The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon respondent but upon the Federal judicial system.

It is one thing for the trial court to assume jurisdiction where none in fact exists, yet it is still another for the Eighth Circuit to justify its holding by claiming fraud on the part of the petitioner. The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit. Yet, a finding was made on appeal that petitioner concealed the issue of diversity of citizenship until the statute of limitations had run so as to gain "a substantial advantage" over respondent. The factual findings, however, were not merely limited to a determination of concealment. The court elected to publish what it contended to be the strategy underlying this fictional tactic of concealment, without ever having had the advantage of evidence concerning the same.

> "By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly, or, indeed if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists it is clear to all that jurisdiction may be challenged by anyone at any time." (Court's Opinion, Page 24).

Now petitioner is not only expected to bear the loss, but must wear the stain of indignity inherent with allegations and findings of underhanded, unethical conduct.

Petitioner takes e x c e p t i o n to the findings of the Eighth Circuit on the issue of concealment and the motives therefor, when no hearing has been had. The evidence in the record sustained no finding other than that petitioner was remiss in not raising the jurisdictional issue at an earlier stage of the proceedings.

The only issue before the trial court was that of whether pendant or ancillary jurisdiction existed. Respondent's counsel commented on the lateness of the defendant's claim of no diversity of citizenship (C. A. Appendix II, pp. 156, 157).

Defendant's attorney countered that argument and the court agreed. The colloquy between the court and counsel was as follows:

> "Mr. Johnson: Also in regard to his initial comment about our lateness in raising this, I would just say this—
>
> The Court: That can be raised at any time.
>
> Mr. Johnson: That is right. This is not an equitable case.
>
> The Court: That has been the rule since time began.

(Page 207) Mr. Johnson: As to laches, estoppel, or waiver, the Court either has it or it doesn't.

The Court: The only thing that concerns me is this pendant or ancillary question. . . ." (C. A. Appendix II, pp. 159, 160).

If the trial court had indicated during the trial that concealment was an issue, Petitioner could have offered evidence in support of its innocence. But, the trial court emphasized that the only issue was the existence of pendant or ancillary jurisdiction.

The effect of the Eighth Circuit's finding is that a Federal District Court may now acquire subject matter jurisdiction over a cause of action where there is no diversity of citizenship between the parties by the mere running of the statute of limitations. The further effect of the holding is that a defendant may never raise the defense of lack of subject matter jurisdiction after the statute of limitations has run and any defendant that does so is guilty of concealment and unethical conduct.

Rule 12 (h) (3) provides as follows:

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

That rules emphasizes that a subject matter jurisdiction defect requires dismissal *whenever* that defect becomes apparent, not merely prior to the running of the statutes of limitations on the plaintiff's claim.

In the case of *Page v. Wright,* 116 F. 2d 453 (7th Cir. 1940), the Seventh Circuit stated:

". . . (Jurisdiction) cannot be conferred by agreement, consent or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising the question by any form of laches, waiver or estoppel. . . . The answer of the defendant conceding jurisdiction amounted to no more than consent, and as seen, jurisdiction cannot be thus conferred irrespective of whether the consent was the result of an honest mistake or otherwise."

In the initial trial of *Kenrose Manufacturing Co. v. Fred Whittaker Co.,* found at 53 F. R. D. 491 (1971), the trial court stated:

"The plaintiff further contends that the third-party defendant has waived his right to raise this question of jurisdiction since he answered the amended complaint without challenging the lack of diversity jurisdiction. In support of this contention the plaintiffs rely on Rule 12 (h) of the Federal Rules of Civil Procedure. The plaintiffs' contention is without merit. Lack of diversity of citizenship of the parties is a lack of the federal court's subject matter jurisdiction. The third-party defendant's motion to dismiss falls therefore within Rule 12 (b) (1) of the Federal Rules. A Rule 12 (b) (1) motion to dismiss raises a question of the federal court's subject matter jurisdiction and is most typically used, as in this case, when there is no diversity of citizenship. *A motion attacking the court's subject matter jurisdiction may be made at any time by either party or by the court sua sponte.* If the court lacks subject matter jurisdiction, it lacks the power to hear the case. 5 Wright & Miller, Federal Practice and Procedure, § 1350 (1969). While it is true that Rule 12 (h) would treat a motion to dismiss for lack of jurisdiction over the person as waived if not timely made, such is not the case when the court's subject matter jurisdiction is challenged." (Emphasis added.)

The amended complaint of respondent against the petitioner was filed November 9, 1973 (C. A. Appendix I,

p. 23), approximately two months prior to the running of the statute of limitations on January 18, 1974. In its answer to amended complaint filed November 27, 1973, petitioner admitted that Owen Equipment and Erection Company was a corporation organized and existing under the laws of the State of Nebraska and denied each and every other allegation in the Respondent's complaint.

The Eighth Circuit found that the petitioner's answer did not comply with the terms of Rule 8 (b). Petitioner emphatically claims that its answer conformed in all respects to the requirements of this rule. It admitted that Owen Equipment and Erection was a corporation organized and existing under the laws of the State of Nebraska and denied all other allegations. Rule 8 (b) specifically provides:

> ". . . the pleader . . . may generally deny all the averments except such averments or paragraphs as he expressly admits; . . ."

Less than two months after petitioner filed its answer to the amended complaint, the statute of limitations ran. No further action on the file occurred until May 23, 1974 when a hearing on OPPD's motion for summary judgment was had before Judge Denney (C. A. Appendix I, p. 31). The statute of limitations had already run more than five months prior to that date. The issue of the lack of subject matter jurisdiction of the court was not raised by petitioner until its motion for dismissal filed January 15, 1976, two days after trial had commenced (C. A. Appendix I, p. 55).

If petitioner were intentionally "sandbagging" the court, why then didn't petitioner wait until the day after

the statute of limitations had run on January 19, 1974 to raise the issue of lack of subject matter jurisdiction, rather than waiting until the second day of trial to raise the issue? Why wouldn't the issue of lack of diversity of citizenship have been raised in the answer which this defendant filed January 13, 1976 (C. A. Appendix I, p. 49)?

The only reason this issue was not raised at an earlier point in the proceedings was that counsel failed to recognize that as an issue. During trial appellant's corporate counsel, Robert Becker of the law firm of Swarr, May, Smith & Andersen, advised Attorney David A. Johnson who was trying this case on behalf of Owen Equipment and Erection Company that Owen was a Nebraska corporation, but that its principal place of business was in Iowa, and that there was no subject matter jurisdiction. Shortly thereafter, a motion to dismiss was filed on behalf of Owen Equipment and Erection Company. This is the first time this matter was given any consideration by petitioner. (See affidavits of corporate and trial counsel from petition for rehearing in Appendix C, App. pp. 38-39.)

Likewise, it is obvious that the matter was never considered to be an issue by counsel for respondent who took at least four pre-trial depositions in the corporate office of defendant in Carter Lake, Iowa. Two of these depositions were taken of corporate officers.

But it is beyond the understanding of petitioner how the issue of concealment could even come before the 8th Circuit. The rule in the Eighth Circuit as well as other circuits throughout the nation has unanimously been *that*

there is a presumption against the existence of Federal jurisdiction, and thus the party involving the Federal court's jurisdiction bears the burden of proof as to its existence. See *Basso v. Utah Power and Light Co.,* 495 Fed. 2d 906 (10th Cir. 1974); *Emmke v. DeSilva,* 293 Fed. 17 (8th Cir. 1923).

The burden rested on the respondent to overcome the presumption. Respondent discovered as early as June 3, 1974 that the principal place of business of Petitioner was Carter Lake, Iowa. On that date at 1:30 P. M. respondent's counsel took the deposition of the President of Petitioner in its office of Owen *in Carter Lake, Iowa* (C. A. Appendix II, p. 92). During that deposition the following questions were asked of Mr. Owen by respondent's counsel:

> "Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?
>
> A. Here, same headquarters.
>
> Q. Same headquarters.
>
> A. Yes. . . .
>
> Q. I have the impression in my mind's eye, and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?" (C. A. Appendix II, p. 95).

On the 24th day of November, 1972 respondent filed her complaint wherein she alleged under paragraph 5 as follows:

> "That on January 18, 1972, plaintiff's decedent was employed working in the capacity of a machinist for the defendant, Paxton and Vierling Steel Company at *its place of business in Carter Lake, Iowa.* . . ." (Emphasis added.) (C. A. Appendix I, p. 4).

So on the 3rd day of June, 1974, respondent knew that it could not go forward with its burden of proving subject matter jurisdiction. However, the Eighth Circuit chose to believe that petitioner connived respondent and the trial court and concealed from both the principal place of business of the petitioner until the second day of trial.

Isn't it just as conceivable that the exact opposite conclusion could have been reached by the Eighth Circuit on these same facts? After June 3, 1974, it certainly would have behooved respondent to conceal the jurisdictional issue. Respondent had nothing to lose for the statute had already run. She could later claim tardiness when the petitioner raised the issue.

The court relies heavily on the case of *Di Frischai v. New York Central Railroad,* 279 Fed. 2d 141 (3rd Cir. 1960) as authority for its findings. In his treatise of Law of Federal Courts, Wright questions this decision stating:

> "This argument seems to assume that the court has discretion to hear a case where jurisdiction is not present, a very questionable assumption." Law of Federal Courts, Charles Alan Wright, West Publishing Co., 1970, page 17.

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CONCLUSION

The decision of the Eighth Circuit Court of Appeals in this matter most certainly conflicts with the decisions of every other circuit which has addressed the question presented by this Petition. A federal court may not exercise discretion to retain jurisdiction over a claim where jurisdiction in fact does not exist. There is no such power in the federal judicial system. This petitioner respectfully submits that the trial court did not have jurisdiction over the subject matter of the action and thus had no power to enter the verdict and resultant judgment against this petitioner. A plaintiff may not sue a defendant having a common state citizenship with the plaintiff in a United States District Court in any state; but, both the trial court and the Eighth Circuit Court of Appeals in this matter allowed the maintenance of such an action.

Petitioner has been found to have concealed the issue of its citizenship from both the court and the respondent. Information concerning the citizenship of the petitioner was equally available to respondent and petitioner, yet both the trial court and the Eighth Circuit have chosen to place the responsibility for respondent's failure to prove citizenship upon the defendant. Claims of concealment have been manufactured against this petitioner so that the judgment in the amount of $234,756.00 in favor of the plaintiff may be allowed to stand. There is no constitutional or statutory power given to any court to create jurisdiction when it is absent.

If this decision is allowed to stand then no defendant may ever raise the issue of lack of subject matter

jurisdiction of a court after the statute of limitations has run.

All federal courts, by virtue of this decision, may now acquire jurisdiction once the statute of limitations runs, whether or not the requisite diversity of citizenship is present. Such a rule cannot be allowed to exist.

The Eighth Circuit has concluded that the petitioner has played "fast and loose with the judicial machinery", yet the only act of which petitioner is guilty is answering in accordance with Rule 8b of the Federal Rules of Civil Procedure.

This petitioner, therefore, respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals to the Eighth Circuit to review the opinion and judgment of the Eighth Circuit Court of Appeals, rendered in these proceedings on October 16, 1977.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1187

GERALDINE KROGER, ADMINISTRATRIX OF THE ESTATE OF JAMES D. KROGER, DECEASED,

Appellee,

vs.

OWEN EQUIPMENT & ERECTION COMPANY,
a Nebraska Corporation,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Submitted: November 10, 1976

Filed: June 21, 1977

Before LAY and BRIGHT, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

This case involves the death of a workman assisting in moving a large steel tank. The tank was being moved by a large crane, the boom of which came into contact with high tension electric power lines, resulting in the workman's electrocution. At the time the deceased was 28 years of age with a wife and four children. The plaintiff, his widow, as administratrix of his estate, was awarded a jury verdict of $234,756. We affirm.

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*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

The crane involved was owned by the Owen Equipment and Erection Company (hereafter "Owen"), and leased by Paxton & Vierling Steel Company (hereafter "Paxton") for heavy lifting. The case was initiated by a bill of complaint filed by plaintiff, an Iowa citizen, against Omaha Public Power District (hereafter "OPPD"), a Nebraska corporation, and Paxton, also a Nebraska corporation. The course of the pleadings thereafter was long and involved and will be found in the Appendix hereto. We note here only that Owen was impleaded as a third-party defendant by OPPD.

The relationship between defendant Owen and Paxton was somewhat involved. Paxton was engaged in the fabrication of structural steel and the manufacture of farm and similar products. It is a non-union plant. To avoid possible labor trouble in "erecting steel on the outside, which is strictly a union proposition," it formed Owen, both corporations having the same headquarters and the same officers, Owen being 100% owned by Paxton. Owen owned two cranes, operated by Fred (father) and David (son) Morrow, both of whom were on Paxton's payroll. Both of them held union cards. It was David who was operating the crane at the time of decedent's death.

After Owen was organized it hired one Harry Flynn, a qualified crane operator and member of the crane operator's union, to be its erection superintendent. It was he who trained Fred Morrow in the use and upkeep of the cranes and it was Fred himself who trained his son on the job. Fred Morrow retired in 1969. Mr. Flynn retired shortly before the accident and was not replaced

by a successor. David Morrow then remained the sole operator qualified to operate Owen's big outside cranes. When Paxton required the big cranes, the operators went with the crane and "they ran that crane." Mr. Owen, President of Owen, agreed in his deposition that it "wouldn't do [Owen] a bit of good to own those cranes unless [Owen] had operators for them • • •."

After long and involved pleadings, a summary of which, as we have noted, will be found in the Appendix, the parties had, by trial date, January 12, 1976, been reduced to two: plaintiff Kroger, an Iowa citizen, and defendant Owen, charged to be "a Nebraska corporation," and consistently self-admitted in the pleadings to be such.

So stood the description of the parties until noon on the third day of the trial. At this juncture, defendant Owen elicited from witness Petersen, Secretary of Owen, that Owen's principal place of business was in Carter Lake, Iowa. Having done so, defendant, the same afternoon, challenged the jurisdiction of the court on the ground of lack of diversity.

The court and the plaintiff were taken by surprise because of defendant's pleadings. Plaintiff's amended complaint, filed on November 9, 1973, some two years prior to trial, had unequivocally charged that "Owen Equipment and Erection Co. is a Nebraska corporation with its principal place of business in Nebraska." Defendant had not denied this outright. It had utilized a qualified general denial. It "[a]dmit[ted] that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska," and "[d]enie[d] each and every other allegation

contained in said Amended Complaint • • •." This form of answer was in violation of Fed. R. Civ. P. 8(b) which provides that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder."[1] Thus, defendant's admission of part of an averment and denial of the balance in a qualified general denial clearly does not meet the requirements of the Rule quoted. Nor, as also required by Rule 8(b), does it fairly meet the substance of the averment denied.

Appellant finally admitted on oral argument to us, after close questioning, a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended bill of complaint, filed on November 9, 1973, charging Owen to be "a Nebraska corporation with its principal place of business in Nebraska." Owen waited until near the close of the trial to make its challenge. The point had been concealed during the entire period of time since the filing of the amended complaint some two years theretofore. Under

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1 *See Kirby v. Turner-Day & Woolworth Handle Co.*, 50 F. Supp. 469, 470 (E. D. Tenn. 1943); 2A *Moore's Federal Practice* ¶ 8.23, at 1828 (2d ed. 1975) (hereafter *"Moore's"*); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1266, at 284 (1969) (hereafter *"Wright & Miller"*).

similar circumstances, the Third Circuit has held the allegation as to defendant's citizenship to be admitted.[2]

The District Court rejected the challenge to its jurisdiction, holding, in its Memorandum Opinion, that although no independent basis of jurisdiction existed as to Owen, nevertheless it had discretion under the *Gibbs* case,[3] to exercise its judicial power over the case. It held, in part, that:

> The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Alson v. United States*, 38 F. R. D. 489 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.
>
> Properly read, *United Mine Workers* [v. *Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i. e., all claims, state or federal, which derive from a common nucleus of operative facts. . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27[1], 14-569 to 14-570.

2 In *Biggs v. Public Service Coordinated Transport*, 280 F. 2d 311 (3d Cir. 1964), the pleader asserted a proper amount in controversy, and, further, that defendant was a New Jersey corporation doing business in Pennsylvania. Defendant's answer specifically denied that the amount in controversy was in excess of the statutory minimum, but the allegation that defendant was incorporated in New Jersey was only met by a qualified general denial. The *Biggs* court held:

> We cannot for a moment believe that defendant's counsel was denying in good faith that his client was a New Jersey corporation. We think the only fair interpretation of the pleading in this case is that the denial does not run to the allegation of defendant's citizenship. *Therefore, that allegation must be deemed to be admitted.* Fed. R. Civ. P. 8 (d).

280 F. 2d at 313-14 (footnote omitted; emphasis added).

3 *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966).

This case is nevertheless novel, in that the third party plaintiff was dismissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this "pendent" claim.[4] Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run.[5] Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction.

The problem presented arises in the area of ancillary and pendant jurisdiction. We start, of course, with the

4 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context. (Footnote in original.)

5 We express no opinion on this point, it not having been briefed by either party hereto and being only one of the factors to be considered in the exercise of the Court's discretion. (Footnote ours.)

proposition that federal courts are courts of limited jurisdiction.[6] However, under the developing doctrines of pendent and ancillary jurisdiction,[7] there has been expansion of federal jurisdiction into areas which ordinarily do not come under the jurisdiction of the federal courts. The limits of this expansion are our immediate concern.

Modern analysis starts with the landmark decision in *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966).[8] In this case, the plaintiff, a mining superintendent and hauling contractor, was prevented from the performance of his contract by a local union which had forcibly prevented the opening of the mine. Suit was brought in the federal court alleging violation of section 303 of the Labor Man-

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6 U. S. Const. art. III, § 2; Act of Sept. 24, 1789, 1 Stat. 73 (Judiciary Act).

7 Differentiations of many kinds may be made between the doctrines of ancillary and pendent jurisdiction. As to the utility thereof, *see Aldinger v. Howard,* 427 U. S. 1, 13 (1976):

> Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.

The historical development of both of these doctrines, which had disparate origins, may be found in Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U. C. L. A. L. Rev. 1263, 1265-70 (1975) (and cases and articles therein cited); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 Colum. L. Rev. 1018 (1962); Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 Va. L. Rev. 265, 267-72 (1971).

8 For a discussion of *Gibbs,* see Note, *UMW v. Gibbs and Pendent Jurisdiction,* 81 Harv. L. Rev. 657 (1968).

agement Relations Act,[9] to which was joined a state claim for malicious interference with contract rights. Plaintiff prevailed on both claims, but upon motion for judgment n. o. v. the federal claim was held non-actionable and judgment entered on the state claim, with affirmation by the Court of Appeals following.[10]

The Supreme Court affirmed the assumption of jurisdiction over the pendent state claim.[11] The significance of the *Gibbs* case for our purposes lies in its discarding of the test established in *Hurn v. Oursler,* 289 U. S. 238, 246 (1933), for pendent jurisdiction, under which pendent jurisdiction was present when "two distinct grounds in support of a single cause of action[12] [were] alleged, one only of which present[ed] a federal question," but not "where two separate and distinct causes of action [were] alleged, one only of which [was] federal in character." In place of the *Hurn* test, the Court held that pendent jurisdiction is present whenever the state and federal claims "derive from a common nucleus of operative fact" to the degree that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding."[13] If, the Court continued, the state claim is so related to the

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9 29 U. S. C. § 187.

10 *Gibbs v. United Mine Workers,* 343 F. 2d 609 (6th Cir. 1965).

11 In dealing with the merits, however, the Court reversed.

12 This phraseology had caused much difficulty in the lower courts due to the metaphysical nature of "cause of action." *See Gibbs, supra,* 383 U. S. at 722-24; Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, supra* note 7, at 1029-30. (Footnote ours.)

13 383 U. S. at 725.

federal claim that there is "but one constitutional 'case'," there is power to exercise pendent jurisdiction and it is "unnecessarily grudging" to limit the availability of pendent jurisdiction more narrowly than is constitutionally required.[14]

Owen, as noted *supra,* was impleaded by OPPD as a third-party defendant pursuant to Fed. R. Civ. P. 14 (a).[15]

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14 *Id.* at 725.

15 "(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. * * *."

The provisions of Rule 14 (a) governing third-party practice are extremely broad, permitting the third-party defendant to assert against the plaintiff "any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff," and the plaintiff to assert against the third-party defendant "any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

Rule 14, however, is silent as to whether independent jurisdictional grounds are required for such claims and thus arises our question. It is to be noted, however, that Rule 14 (a) does not by itself extend the jurisdiction of the federal courts.[16] It is clear that many of the claims which Rule 14 (a) permits to be joined with the main claim asserted by the plaintiff have been allowed without an independent basis of jurisdiction under the doctrine of ancillary jurisdiction. Professors Wright and Miller state that "'[t]he cases on point almost all hold that defendant's claim against a third-party defendant is within the ancillary jurisdiction of the federal courts,"[17] even though there may be no diversity between these parties. *See, e. g., Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 F. 2d 408, 415 (8th Cir. 1953). The courts have also allowed, without an independent basis of jurisdiction, the third-party defendant's claim against the plaintiff, arising

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16 Fed. R. Civ. P. 82 provides:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *.

17 6 *Wright & Miller* § 1444, at 223 (footnote omitted).

out of the same transaction as the plaintiff's main claim.[18] Since much of what we are about to write concerns diversity, we think it not inappropriate to point out that such action against the plaintiff has been held to be within the court's ancillary jurisdiction, even when the main claim is based upon diversity jurisdiction and both the third-party defendant and plaintiff are citizens of the same state.[19] Thus, in view of the breadth of Rule 14 (a), combined with current ancillary and pendent jurisdiction doctrine it is not unusual for courts to adjudicate ancillary claims having no independent jurisdictional basis.[20]

On the other hand, the great numerical majority of cases have held that if the plaintiff asserts a claim against the third-party defendant, as permitted by Rule 14 (a), there must be independent grounds for jurisdiction.[21] The

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18 *See Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F. 2d 709 (5th Cir. 1970), but note comments thereon in *Fawvor v. Texaco, Inc.*, 546 F. 2d 636, 642 (5th Cir. 1977); *General Dynamics Corp.*, 486 F. 2d 763, 772 (7th Cir. 1973), *cert. denied*, 414 U. S. 1146 (1974) (adopting the reasoning of the Fifth Circuit in *Revere Copper); L & E Co. v. U. S. A. ex rel. Kaiser Gypsum Co.*, 351 F. 2d 880, 882 (9th Cir. 1965).

19 *See, e. g., Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., supra* note 18.

20 For a summary of the many instances in which the district courts adjudicate ancillary claims having no independent jurisdictional basis, see 13 *Wright & Miller* § 3523, at 66-70.

21 *See, e. g., Fawvor v. Texaco, Inc., supra* note 18. *But see, e. g., Morgan v. Serro Travel Trailer Co.*, 69 F. R. D. 697 (D. Kan. 1975) (holding that plaintiff, in appropriate cases, may assert a claim against third-party defendant without there being an independent basis of jurisdiction). The cases pro and con on whether independent jurisdictional grounds are required for plaintiff to assert a claim against third-party defendant are gathered in *Fawvor, supra*, 546 F. 2d at 639 n. 7, and in Note, *Rule 14 (a) and Ancillary Jurisdiction: Plaintiff's Claim Against Non-Diverse Third-Party Defendant*, 33 Wash. & Lee L. Rev. 796, 798-99 nn. 10-12 (1976).

older, pre-*Gibbs*, cases, including one from our court,[22] support the proposition with almost complete unanimity,[23] as did the first edition of Prof. Moore's treatise.[24]

After the landmark decision in *Gibbs*, however, the underpinnings of the restrictive rule were swept away. Prof. Moore's later edition, following the holding in *Gibbs*, submitted that the matter of accepting jurisdiction should be within the trial court's discretion, arguing trenchantly that:

> Properly read, *United Mine Workers* reemphasizes the fundamental principal that a federal court has *jurisdictional power* to adjudicate the *whole case, i. e.*, all claims, state or federal, which derive from a common nucleus of operative facts. Thus it is now possible for lower federal courts to reach decisions allowing jurisdiction over some joined claims and parties, which previously would probably have been rejected for lack of subject matter jurisdiction. If *United Mine Workers* does signal such relaxation of the prohibitory rule as to original joinder of claims and parties, then, consequently its corrollary rule forbidding

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22 *United States v. Lushbough*, 200 F. 2d 717 (8th Cir. 1952). We note the holding in *Lushbough* that diversity was required to support a judgment in favor of plaintiff against third-party defendant was an alternative ground of decision, the other ground being that plaintiff was precluded from claiming against third-party defendant by 28 U. S. C. § 2676. In view of developments in the law of pendent and ancillary jurisdiction subsequent to Lushbough, we deem it wise to reexamine the position taken by us in that case on the jurisdictional issue at bar.

23 *But see L & E Co. v. U. S. A. Kaiser Gypsum Co.*, 351 F. 2d 880, 882 (9th Cir. 1965); *Olson v. United States*, 38 F. R. D. 489 (D. Neb. 1965); *Myer v. Lyford*, 2 F. R. D. 507 (M. D. Pa. 1942); *Sklar v. Hayes*, 1 F. R. D. 594, 596 (E. D. Pa. 1941).

24 1 *Moore's* § 14.02, at 748 (1st ed. 1938).

ancillary jurisdiction of a claim by the plaintiff against the third-party defendant must also be relaxed.

But regardless of jurisdictional developments under Rules 18 and 20, *United Mine Workers* can authorize an independent relaxation of the rule against ancillary jurisdiction over plaintiff's amended claims against the third-party defendant. At the outset, the question must be redefined. It should not be a question of pure law posing the choice "either there is an ancillary jurisdiction and the court must take it, or there is no ancillary jurisdiction, and the court cannot take it." Instead, since there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. Once this basic redefinition takes place, the traditional reasons given for supporting a rule of flat prohibition do not necessarily disappear. Instead they become factors for the trial court to consider in exercising its discretion.[25]

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25 3 *Moore's* ¶ 14.27 [1], at 14-569 to 14-570 (footnotes omitted; emphasis in original).

In *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F. 2d 890, 893-94 (4th Cir. 1972), Judges Sobeloff, summarized the arguments ogten given in support of the majority view that independent jurisdictional grounds are required in order for plaintiff to assert claim against third-party defendant:

> Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule precents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and

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> third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation. [Footnotes omitted.]

Professor Moore has incisively criticized these arguments in his treatise. *See* 3 *Moore's* ¶ 14.27 [1], at 14-570 to 572. *See also Morgan v. Serro Travel Trailer Co., supra,* 69 F. R. D. at 702-04.

In response to the argument that plaintiff should not be able to do indirectly what he cannot do directly, Professor Moore replies:

> [W]hy shouldn't A. B. [plaintiff] be able to do it indirectly? A. B. took his chance in suing C. D. [defendant] alone in the federal court. It was C. D.'s choice, not A. B.'s, to bring in E. F. [third-party defendant], and now that E. F. is before the court, judicial economy and convenience may dictate that the court dispose of the whole case by allowing all claims deriving from a common nucleus of operative fact.

3 *Moore's* ¶ 14.27 [1] at 14-570 to 571 (footnote omitted).

The argument that the majority rule prevents collusion has been termed "the *raison d'etre*" of that rule; the other arguments being described as "largely 'make-weights'." *Morgan, supra,* 69 F.R. D. at 702-03. Professor Moore states and we agree, that 28 U. S. C. § 1359, which provides that "[a] district court shall not have jurisdiction of a civil action in which any party * * * has been improperly or collusively made or joined to invoke the jurisdiction of such court, is an adequate answer to the specter of collusion." 3 *Moore's* ¶ 14.27 [1], at 14-571. "Fears of collusion do not justify a wholesale denial of jurisdiction." *Id.*

The third argument given in support of the majority rule rests on an overly narrow view of ancillary jurisdiction. Professor Moore puts it this way:

> Ancillary jurisdiction is a much broader concept resting upon multiple reasons of economy and convenience. Thus, it is clearly established that ancillary jurisdiction allows jurisdiction over claims and counterclaims between C. D. [third-party plaintiff] and E. F. [third-party defendant] even though those claims lack diversity and jurisdictional amount and could not have been brought

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The solution to the problem presented as to the District Court's retention of jurisdiction in the case at bar is clearly outlined in *Gibbs*. That decision enunciated a two step process for the resolution of the ancillary-pendent jurisdiction problem: First, the determination of whether or not there is *power* in the federal courts to hear the whole matter. If there is, the Court continues, "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants • • •."[26]

At the time the plaintiff amended her complaint to assert a claim against Owen there is no question but that

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> as original law suits. The same broad principle and result should not be offensive when applied to ancillary jurisdiction between A. B. [plaintiff] and E. F. If E. F. had voluntarily entered the suit as a non-indispensable defendant by intervention under Rule 24(a), there clearly can be ancillary jurisdiction over the claims between E. F. and A. B. The same result should be obtained whether E. F. enters voluntarily under Rule 24 or involuntarily by C. D.'s impleader under Rule 14. In brief, there should be no rule forbidding building one ancillary jurisdiction on another.

Id. at 14-571 to 572 (footnotes omitted).

The fourth argument in support of the majority rule, that federal courts are too busy to "reach out for state law based litigation," rests upon a parochial view of federalism. "If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total in-economy and inconvenience which itigants must suffer to obtain justice on the merits of their claims." *Id.* at 14-572 (footnote omitted).

26 383 U. S. at 726 (footnote omitted).

the court had jurisdiction over plaintiff's claim against OPPD and OPPD's third-party claim against Owen,[27] But the question presented is whether the court also had power over the plaintiff-Owen's claim.

Within the framework of the *Gibbs* decision, Kroger's claim against Owen arises out of the core of "operative facts" giving rise to both Kroger's claim against OPPD and OPPD's claim against Owen. All parties were before the court and it is both paradoxical and anomalous to hold in this situation that, although Kroger can go against OPPD which can go against Owen, and Owen may proceed against Kroger, Kroger cannot proceed against Owen. This result is not demanded by Rule 14 and has its origins in the mists of the precedents of earlier days and crystallized concepts that cannot stand the light of searching modern examination.

It is an over-simplification of the result we seek to cast the problem in terms of black and white, that is, jurisdiction or no jurisdiction. The matter is broader than that. Once the court has before it all of the parties to the controversy, sharing common and interrelated facts, it has power in the jurisdictional sense to dispose of the case. To say, in a modern court, under modern rules,[28] that a third-party defendant may sue a plaintiff of the same state, but not the converse, is a monument to the

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27 The power as to the Kroger-OPPD claim rested upon diversity, and as to the OPPD-Owen third-party claim, the court had ancillary jurisdiction. *Waylander-Peterson Co. v. Great Northern Ry. Co., supra;* 6 *Wright & Miller* § 1444, at 223 (quoted *supra* at p. 11).

28 "Under the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." *Gibbs, supra,* 383 U. S. at 724 (footnote omitted).

triumph of rule over reason, "a step backward to the time when piecemeal litigation, tactical maneuvering by procedural devices, inconvenience to litigants, duplication of litigation in different courts, and a resulting waste of judicial and litigant time and resources were the hallmarks of formalistic rules of civil procedure."[29]

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29 Note, *Rule 14 Claims and Ancillary Jurisdiction, supra* note 7, at 289.

Owen contends that the recent Supreme Court decision, *Aldinger v. Howard*, 427 U. S. 1 (1976), supports its contention that the District Court was without power to exercise jurisdiction over Kroger's direct claim against it. We disagree.

The *Aldinger* court's holding was a narrow one:

> All that we hold is that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within [28 U. S. C.] § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of [42 U. S. C.] § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction.

Id. at 17-18 n. 12. The *Aldinger* court carefully limited its decision to the context of claims brought under 28 U. S. C. § 1343 (3) and 42 U. S.C. § 1983:

> [W]e decide here only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343 (3) and 1983. *Other statutory grants and other alignments of parties and claims might call for a different result.*

Id. at 18 (emphasis added).

The instant case presents an alignment of parties and claims significantly different from that presented in *Aldinger*. In *Aldinger*, the municipal corporation over which plaintiff sought to have the court assert pendent jurisdiction, was a "new party * * * not otherwise subject to federal jurisdiction." *Id.* The impleading of such a party, presents "a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim." *Id.* In the instant case, Owen was already before the court on OPPD's third-party claim, a state law claim within the court's ancillary jurisdiction. See p. 11 and note 27, *supra*.

The judicial power is there. Whether or not to use it answers to no *ipse dixit*. The question is whether to exercise that power, "considering all the factors of economy and convenience in the context of federalism."[30]

Thus remains the exercise of discretion. And it is for this reason, we are convinced, that we are warned, from the earliest cases to the latest, that there can be no blanket rule governing all cases, no per se dogma to serve as an easy substitute for thought.

> As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction.[31]

The factors governing the exercise of discretion were expressed in *Gibbs* to be "judicial economy, convenience, and fairness to litigants."[32] The satisfaction here of the first two requirements requires no exegesis. It is upon the element of fairness that we shall speak. The defendant before us has connived for himself an unfair advantage. But what he has overlooked in all of this is the court's exercise of discretion in terms of fairness. It is not without significance that well prior to *Gibbs* the discretion of the trial court was relied upon in denying belated challenges to jurisdiction in situations of oppression.[33] In the *Di Frischia* case, after a series of plead-

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30 3 *Moore's* ¶ 14.27 [1], at 14-570.

31 *Aldinger, supra*, 427 U. S. at 18.

32 383 U. S. at 726.

33 *See Di Frischia v. New York Cent. R. R.*, 279 F. 2d 141 (3d Cir. 1960); *Klee v. Pittsburgh & W. Va. Ry.*, 22 F. R. D. 252 (W. D. Pa. 1958).

ings, preparations for trial, and a stipulation of diversity, a defendant sought to amend its answer on the eve of trial, once again bringing up the matter of jurisdiction. The District Court dismissed the action, but the Court of Appeals reversed, resting decision on the discretion vested in the trial court and stating that "[a] defendant may not play fast and loose with the judicial machinery and deceive the courts."[34]

A situation similar in principle and with similar results in the retention of jurisdiction is found in *Murphy*

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34 279 F. 2d at 144. The *Di Frischia* court held in part:

> We are equally cognizant of our holding in Hospoder v. United States, 3 Cir., 1953, 209 F. 2d 427, 429, where we stated:
>
> "It is axiomatic that jurisdiction may not be conferred or waived by the parties and that courts at every stage of the proceedings may and must examine into its existence."

However, the instant case is governed by a different line of authority that is equally well recognized. In Young v. Handwork, 7 Cir., 1949, 179 F. 2d 70, 16 A. L. R. 2d 825, certiorari denied 1950, 339 U. S. 949, 70 S. Ct. 804, 805, 94 L. Ed. 1363, we have a similar state of facts, for after raising the question of lack of diversity in its answer the defendants omitted such question from their amended motion and in open court admitted the facts in plaintiff's complaint. Following determination by the court on the merits, the defendant once again attempted to raise the issue, but the court denied leave to file the amendment and the action was sustained by the court of appeals. Similarly, in the instant case the defendant had its opportunity to have the issue heard and to present its position but chose to admit the allegations of plaintiff's complaint. Thereafter it fully participated in the appropriate discovery and pretrial procedures preparatory to trial of the action on the merits. Having done so, a further attempt to amend its answer to return to its previous defense of lack of diversity could certainly not be made as of right. Allowance of such an amendment under the circumstances would be an abuse of discertion. Cf. Klee v.

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v. *Kodz*, 351 F. 2d 163 (9th Cir. 1965). There the plaintiff's decedent was killed in a mid-air collision, plaintiff bringing action in state court against one Shupe and other parties. Mr. Shupe, alleging that he was an officer of the Forest Service acting in his official capacity at the time of the accident, had the case removed to the District Court, pursuant to 28 U. S. C. § 1442 (a) (1). No head of federal jurisdiction was alleged as to the remaining defendants. The trial resulted in a judgment in favor of Shupe, but the jury was unable to agree on the liability of the other defendants. As to them, a new trial resulted in plaintiff's favor, whereupon defendants moved to remand the case to the state court, arguing that the federal court had lost further jurisdiction of the case upon entry of the judgment for Shupe, who was the sole party entitled to invoke that court's jurisdiction.

The motions were denied by the District Court. The Ninth Circuit affirmed, finding an analogy "in the penumbral area of federal jurisdiction, so-called ancillary or pendent jurisdiction," citing, among other cases, *Hurn v. Oursler, supra.* After a review of the authorities applicable to the particular area of jurisdiction at bar, which, as the court noted, has analogies to pendent and ancillary

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> Pittsburgh & West Virginia Railway Co., D. C. W. D. Pa. 1958, 22 F. R. D. 252. A defendant may not play fast and loose with the judicial machinery and deceive the courts.

Id. See also Biggs, supra note 2. *Di Frischia* is commented upon in C. Wright, *Handbook of the Law of Federal Courts* § 8, at 18-19 (3d ed. 1976); Stephens, *Estoppel to Deny Federal Jurisdiction—Klee and Di Frischia Break Ground*, 68 Dick. L. Rev. 39 (1963); 15 U. Miami L. Rev. 315 (1961); 7 Utah L. Rev. 258 (1960).

jurisdiction, the court stated that the District Court had discretion in the premises and concluded in language equally applicable to the case before us:

> We need not rest our decision on any claim of judicial economy, for we are impressed that no opportunity for exercise of that discretion was accorded the District Court by motion to remand at the close of the federal facet of the case. That the District Court proceeded with the non-federal claims does not, in this instance, afford a ground for reversal: Failure of the appellants to bring to the attention of the court considerations requiring an exercise of discretion estops them from asserting that privilege after decision on the merits. [Citing cases.] To hold otherwise would encourage litigants to wager on their success on the merits, and if they lost, permit them to call the contest a nullity.[35]

In the case before us, the District Court stood squarely upon its discretionary powers in the premises, relying on *Gibbs*. Defendant Owen attacks the applicability of this doctrine to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered.[36]

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35 351 F. 2d at 168.

36 *See* 6 *Wright & Miller* § 1444, at 234-237, and cases therein cited. In language that is strikingly applicable to the case at bar, Professors Wright and Miller state that "if there has been a substantial commitment of the court's or litigant's resources prior to the termination of the main claim, dismissal of the Rule 14 claim will run counter to the rationale justifying ancillary jurisdiction and third-party practice." *Id.* at 237. *See also Dery v. Wyer*, 265 F. 2d 804, 808 (2d Cir. 1959):

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But beyond that, however, there are other considerations. By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, it asserts that it can even then challenge jurisdiction and successfully, so it argues, since it insists that it is clear to all that jurisdiction may be challenged by anyone at any time.[37]

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> Generally, in a diversity action, if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction. [Citing cases.] This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction. It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action. * * *
>
> Considerations of policy * * * accord with our conclusion.

37 Distinguished scholars have gone so far as to suggest, with respect to the dogma of "challenge jurisdiction any place any time" that we are becoming involved in mere "fetishism."

> If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured. This is true whether the case is at the trial stage or the appellate stage, and whether the defect is called to the court's attention "by suggestion of the parties or otherwise." Probably it would be possible to fill the rest of this book with citations and thumbnail abstracts of cases illustrating the application of this principle.
>
> This is established practice. Is it fetichism [sic]? Or is it grounded on solid considerations of policy and of legislative and j u d i c i a l statesmanship? Why

(Continued on following page)

But plaintiff overlooks the application of the *Gibbs* doctrine to ancillary litigation. The District Court had judicial *power* over the case initially and we find no abuse of its discretion in the continued exercise of that power. But beyond that, whether the court's discretion was abused

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> should not a party who has invoked federal jurisdiction, or failed seasonably to object to it, be held to have waived any defect, or be estopped from asserting it?

P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's *The Federal Courts and The Federal System* 835-36 (2d ed. 1973). Consider also the comments of the distinguished American Law Institute reflecting the disturbance, not only of distinguished scholars, but of many courts:

> At the present time and throughout the history of the federal judicial system, it has been possible for either party to raise, or for the court on its motion to consider, a question of jurisdiction over the subject matter at any stage in the course of litigation. *See, e. g., Mansfield, Coldwater & Lake Mich. Ry. v. Swan,* 111 U. S. 379 (1884). Even the party who has invoked jurisdiction may subsequently challenge it if the result of a trial on the merits is unfavorable. *See, e. g., American Fire and Cas. Co. v. Finn,* 341 U. S. 6 (1951). And a wily defendant may conceal a known jurisdictional defect until the period of the statute of limitations has run, then obtain dismissal, and achieve total immunity from suit. Some decisions indicate that he may even do this by controverting jurisdictional facts previously alleged or admitted. *E. g., Page v. Wright,* 116 F. 2d 449 (7th Cir. 1940) [*Ramsey v. Mellon Nat'l Bank & Trust Co.,* 350 F. 2d 874 (3d Cir. 1965)]. *But see Di Frischia v. New York Cent. R. R.,* 279 F. 2d 141 (3d Cir. 1960).
>
> As many commentators have noted, e. g., 1 *Moore Federal Practice* ¶ 0.60 (4) (2d ed. 1948), this fetish of federal jurisdiction is wholly inconsistent with sound judicial administration and can only serve to diminish respect for a system that tolerates it. Some effective limitation on the raising and consideration of jurisdictional issues seems long overdue.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 366 (1969)

or not in its retention of the cause, defendant's conduct estops it from asserting abuse of discretion, not only under the teaching of *Murphy v. Kodz, supra,* but also under the most elementary considerations of judicial fairness. "Despite the fact that defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered • • •."[38]

The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct.

Proceeding to the merits, the case was submitted to the jury under, among others, the following instruction:

> A plaintiff may proceed in a case under more than one theory of law. In this case, plaintiff alleges two theories, as subsequently explained, only one of which he need prove in order to recover:
>
> 1. That the crane supplied by defendant was unsafe for the purpose it was intended.
> 2. That the crane operator was in the employment of defendant and that defendant is therefore liable for the negligent acts of the crane operator.

There was no error in this instruction. It is well established that the trial court has the duty to submit to the jury all issues raised by the pleadings which have evidentiary support. *Flentie v. American Community Stores Corp.,* 389 F. 2d 80, 82 (8th Cir. 1968) (applying Iowa law); *Campbell v. Martin,* 257 Iowa 1247, 136 N. W. 2d 508, 511 (1965). In addition the court properly in-

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38 District Court Memorandum Opinion, quoted more fully at pp. 5-6, *supra.*

structed the jury on the establishment of negligence, causation, and damage.

Here there was ample and controverted evidence submitted on each of the theories of the plaintiff. The first issue presented by the court in its instructions related to the safe or unsafe condition of the crane concededly owned by defendant Owen. On this issue plaintiff's expert testified, as to described safety devices, that

> Well, with these safety devices available, I just don't think it is right to put a product out anywhere for rent or use for anybody unless it is equipped with it. You cannot assume, for example, that whoever it goes to are necessarily trained in safety and are going to take all the precautions and when a safety device is available and is being used in the industry, it is my opinion that these cranes and booms should be so equipped.

One of the issues most vigorously argued at trial was whether the crane operator, David Morrow, was a servant of Paxton or of defendant Owen, loaned by Paxton to Owen for this particular job. What the court was faced with was thus the notoriously complex "borrowed servant" problem,[39] that is, the problem of vicarious liability between the general employer, from whose employ the servant came, or the special employer, who was utilizing at

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39 "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried."

Cardoza, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 121 (1921).

the time the servant so obtained. On this issue, the trial court instructed the jury, essentially, that it must decide whether David Morrow was, at the time of the accident, acting as Owen's servant, and that the test of agency as between the general and the special employer was which had the right to control the manner of performance of the work being done. The evidence as to control, as well as other facets of the employment relation, was conflicting and presented a jury question. The instructions, read in their entirety in the light of the unique facts adduced as to Morrow's employment and duties, summarized *supra*, fairly presented the controlling issue to the jury and we find no error therein. *Bengford v. Carlem Corp.*, 156 N. W. 2d 855, 863 (Iowa 1968); *Houlahan v. Brockmeier*, 258 Iowa 1197, 141 N. W. 2d 545, 548 (1966); *Anderson v. Abramson*, 234 Iowa 792, 13 N. W. 2d 315 (19 4); *Kanipe v. Grundy County Rural Electric Co-op*, 231 Iowa 187, 300 N. W. 662, 665 (1941).[40]

We find no merit in the Workmen's Compensation issue as to Kroger. He was in no sense an employee of Owen, borrowed or direct.

Affirmed.

BRIGHT, Circuit Judge, dissenting.

Regretfully, I am unable to join in Judge Talbot Smith's opinion determining that the district court pos-

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40 Appellee relies also on *Nepstad v. Lambert*, 235 Minn. 1, 50 N. W. 2d 614 (1951), citing Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222 (1940), commented upon in 28 Ohio St. L. J. 550, 553-57 (1967).

sessed subject matter jurisdiction over the claims between Kroger and Owen Equipment & Erection Company.

Concededly, the defendant, Owen Equipment, although a Nebraska chartered corporation, maintains its principal business in Iowa, and is, therefore, an Iowa citizen. Congress made clear that for purposes of diversity jurisdiction, a corporation "shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U. S. C. § 1332 (c).

I do not believe that the holding in *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966), can be said to authorize the exercise of jurisdiction over a claim made by a plaintiff against an impleaded third-party defendant without diversity between the parties. In *Gibbs,* the district court already possessed subject matter jurisdiction over a federal claim between the two parties, so it was appropriate and within the federal court's judicial power to resolve a state claim appended to the federal claim. Here, the threshold question is whether ancillary jurisdiction supports Kroger's claim even though she has no claim against Owen with an independent jurisdictional basis.

I believe that the Supreme Court's pronouncements in *Aldinger v. Howard,* 427 U. S. 1 (1976), and cases such as *American Fire & Cas. Co. v. Finn,* 341 U. S. 6 (1951), require that we dismiss the case for want of jurisdiction.

Aldinger was an action brought under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983 against several county officials. The plaintiff attempted to join state law claims against the county itself arising out of the same facts

on a theory of pendent or ancillary jurisdiction. The Supreme Court rejected that attempt and with it the sort of reasoning found in the majority opinion.

In response to arguments that "pendent party" jurisdiction over a state law claim should be allowed even in the absence of another claim between the same parties with an independent jurisdictional base, the Court said:

> From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to *their* federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But *it is quite another thing to permit a plaintiff,* who has asserted a claim against one defendant with respect to which there is federal jurisdiction, *to implead an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction,* simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." [*Gibbs,* 383 U. S. at 725]. True, the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding. . . ." *Ibid.* But the addition of a completely new party would run counter to the well-established principle that federal court, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 512 F. 2d 890, 894 (CA 4 1972):
>
> > "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assess-

> ing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."
>
> [427 U. S. at 14-15 (emphasis added).]

The situation is the same here. That the same facts may have been involved in Kroger's claim against Owen as those in Kroger's claim against the Omaha Public Power District is not by itself sufficient basis for ancillary or pendent jurisdiction over the claim against Owen. Had Kroger wished to sue both Owen and the Power District in a single forum, she could have done so in a state court. *See Fawvor v. Texaco, Inc.*, 546 F. 2d 636, 640-41, 643 (5th Cir. 1977). *Aldinger's reliance on Kenrose Mfg. Co. v. Fred Whitaker Co., supra,* 512 F. 2d 890, which also involved an attempt by a plaintiff in a diversity case to assert state law claims against a nondiverse third-party defendant is especially instructive.

The majority in distinguishing *Aldinger* fails to address the rationale for disclaiming federal jurisdiction presented in *Aldinger*:

> Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence. [*Id.* at 18.]

As *Aldinger* makes clear, 427 U. S. at 15-16, *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966), explicates the federal courts' power under article III in the face of congressional silence. *See also* Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 Colum. L. Rev. 127, 128-30, 140-42 (1977). *Gibbs* does not deal with the issue before

us, for here the Congress expressly limits by statute, 28 U. S. C. § 1332, the parties to which diversity jurisdiction extends.

Since *Strawbridge v. Curtiss*, 7 U. S. (3 Cranch) 267 (1806), it has been the rule that general diversity jurisdiction over a state law claim requires *complete* diversity between plaintiffs and defendants. The parties to this claim do not satisfy this requirement. Congress has commanded that diversity jurisdiction not extend to claims involving parties such as these. *See Fawvor v. Texaco, Inc., supra,* 546 F. 2d at 638-39; Comment, *supra,* 77 Colum. L. Rev. at 147.[41] As Judge Smith correctly observes, *supra* at 12 and 14 n. 25, citing *Fawvor v. Texaco, Inc., supra,* 546 F. 2d 636, and *Kenrose Mfg. Co. v. Fred Whitaker Co., supra,* 512 F. 2d 890, the majority of federal courts support the view that an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. It also appears that we are the first court of appeals to rule to the contrary. In

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41 A congressional intent to negate pendent jurisdiction cannot be inferred from the majority of jurisdictional statutes, which are intended as affirmative grants of jurisdiction only. Some jurisdictional statutes, however, evince a congressional decision that certain claims should not be heard in federal court. The federal question and diversity statutes, in particular, require that the claims exceed $10,000, and, in the diversity statute, that the parties be of diverse citizenship. The policies which called for the exclusion of claims not meeting these requirements also seem to demand that they not be heard through the exercise of pendent jurisdiction. Since Congress excluded these claims from federal jurisdiction, their adjudication through pendent jurisdiction seems clearly to frustrate congressional intent. [77 Colum. L. Rev. at 147 (footnotes omitted).]

addition to the cases cited by the majority, *see Saalfrank v. O'Daniel,* 533 F. 2d 325 (6th Cir.), *cert. denied sub nom. Saalfrank v. Parkview Mem. Hosp.,* 429 U. S. 922 (1976); *Rosario v. American Export-Isbrandtsen Lines, Inc.,* 531 F. 2d 1227, 1233 & n. 17 (3d Cir.), *cert. denied sub nom. Rosario v. United States,* 429 U. S. 857 (1976). Thus, I would conclude that Congress did not intend that federal courts take jurisdiction over a plaintiff's claim against a third-party defendant, in the absence of independent jurisdictional grounds.

I agree with Judge Smith's critical comments relating to Owen's concealment of the facts concerning diversity until well into the trial. However, it is well settled that a party cannot by his conduct be precluded through laches, waiver, or estoppel from raising a lack of federal subject matter jurisdiction. *See, e. g., American Fire & Cas. Co. v. Finn,* 341 U. S. 6 (1951) (party who removed case to federal court, and successfully resisted plaintiff's attempts to have it remanded, can raise want of jurisdiction after verdict for plaintiff); *Mitchell v. Maurer,* 293 U. S. 237 (1934) (party never raised lack of jurisdiction in any court); *Mansfield, C. & L. M. Ry. v. Swan,* 111 U. S. 379 (1884) (same as *Finn, supra*). That counsel for defendant played fast and loose with the court calls for sanctions by the court against the responsible parties, not the exercise of jurisdiction which the federal court does not otherwise possess. *See Mansfield, C. & L. M. Ry. v. Swan, supra,* 111 U. S. at 386-89; *Basso v. Utah Power & Light Co.,* 495 F. 2d 906, 910 (10th Cir. 1974); *Page v. Wright,* 116 F. 2d 449, 454-55 (7th Cir. 1940).

When a litigant's attorney has intentionally misled the court as to the jurisdictional facts and thus "sand-

bags" his opponent and the district judge, as appears to be the case here, the court possesses ample power to impose appropriate sanctions against the malefactor. Under somewhat similar circumstances, the Tenth Circuit dismissed the plaintiff's cause for lack of diversity, but directed that "all reasonable costs and expenses should be assessed against defendant including a reasonable attorney's fee on appeal." That court also noted the existence of a state "saving statute" which would permit the plaintiff to pursue a remedy in state court after the federal dismissal, despite the passage of the usual limitations period for the type of action involved. *Basso v. Utah Power & Light Co., supra,* 495 F. 2d at 910-11.

Similarly, I would remand this case to the district court with directions to dismiss the action for want of subject matter jurisdiction, leaving plaintiff free to pursue her remedy in the Iowa state courts.[42] Moreover, on remand, I would direct the district court to conduct a hearing relative to imposing sanctions against defendant or defendant's counsel, or both. If found appropriate, those sanctions may include all costs and expenses incurred by

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42 I do not agree with the district court's conclusion that if this action is dismissed for lack of jurisdiction, Kroger will be barred from all relief by the statute of limitations. Iowa Code Ann. § 614.10 (West), provides that

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

The facts of this case appear to bring it within this savings provision.

plaintiff, Geraldine Kroger, in pressing the action against Owen Equipment and may include a reasonable sum for attorneys' fees for services, pretrial, trial, and on this appeal.

In sum, while I disagree with the majority's disposition of this appeal, I emphatically agree that a drastic remedy is necessary to deter other litigants from engaging in concealment and delay in presenting known jurisdictional facts to the court by the party in possession of those facts in order to obtain an advantage in the conduct of litigation at the expense, not only of the opposing party, but of the court itself. Such conduct substantially hinders the proper and efficient administration of justice and wastes the time of judges, court personnel, and juries in the already overburdened federal courts. This dissenter suggests that such sanctions may be a more appropriate remedy for the abuse practiced in this case than opening the door to even more diversity cases than those already competing for judicial attention on the crowded dockets of the federal courts, particularly when state courts can dispose of all the state law claims involved in such cases. *See Ayoub v. Helm's Express, Inc.*, 300 F. Supp. 473 (W. D. Pa. 1969).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT

APPENDIX

The case was commenced by a complaint filed on November 24, 1972, by Geraldine Kroger, an Iowa citizen, administratrix of the estate of James D. Kroger, deceased, against the Omaha Public Power District (hereafter "OPPD"), a public corporation existing under the laws of the State of Nebraska, and having its principal place of business in Omaha, for negligence in the construction, maintenance, and operation of its power transmission line alleged to have been the proximate cause of plaintiff's decedent's death. The Paxton & Vierling Steel Company (hereafter "Paxton"), also a Nebraska corporation, was made a party defendant "for the sole and only purpose of determining its rights under the Workmen's Compensation Act, if any * * *." The parties agree that Paxton was dismissed out of this phase of the action, appellant stating, "because of a jurisdictional defect." The order with respect thereto is not found in the record before us. OPPD thereafter filed a third-party complaint against Paxton and "Owen Construction Co., Inc." (hereafter "Owen Construction"). Shortly thereafter, OPPD filed a motion for dismissal of Owen Construction, having ascertained that its proper corporate name was Owen Equipment and Erection Co. (hereafter "Owen Equipment"). The motion was granted and the court ordered that Owen Construction, "an Iowa corporation," be dismissed with prejudice and granted OPPD permission to file an "Amended Third-Party Complaint naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional Third-Party Defendant * * *." OPPD's amended third-party complaint against Owen Equipment, "a Ne-

braska corporation," was subsequently filed. This is the Owen corporation remaining in the case.

Owen Equipment's answer to OPPD's amended third-party complaint stated as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.
2. Denies each and every other allegation contained in said Third-Party Complaint except those allegations which would be in the nature of admissions against the interest of the third-party plaintiff.

Plaintiff Kroger moved also for an order permitting her to add as a party defendant Owen Equipment, "a Nebraska corporation." Plaintiff filed such amended complaint against Owen Equipment, on November 9, 1973, describing it as "a Nebraska corporation with its principal place of business in Nebraska." Owen Equipment's answer thereto stated in pertinent part that it:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska.
2. Denies each and every other allegation contained in said Amended Complaint, except those allegations which would be in the nature of admissions against the interest of the plaintiff.

OPPD had moved for summary judgment on October 30, 1973. On September 9, 1975, this court affirmed the District Court's judgment in favor of OPPD against the plaintiff, dismissing OPPD, a Nebraska corporation, from the cause. *Kroger v. Omaha Public Power District,* 523 F. 2d 161 (8th Cir. 1975).

Shortly thereafter Owen Equipment's motion for summary judgment, which had been filed in September of 1974 was heard and denied by the court. This motion, by Owen Equipment, "a Nebraska Corporation," raised no issue of jurisdiction, made no point as to lack of diversity, nor did it make any mention of where Owen Equipment's principal place of business might be. The motion was denied on November 14, 1975, and trial commenced on January 12, 1976.

On January 13, 1976, during the trial, Owen Equipment filed an answer asserting that the court lacked subject matter jurisdiction, but failing to specify lack of diversity as the reason therefor. On January 14, 1976, after having raised lack of diversity, Owen Equipment moved for leave to file another amended answer which like the answer of January 13, asserted lack of subject matter jurisdiction but failed to specify lack of diversity. The court denied Owen Equipment's motion for leave to file an amended answer.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

76-1187

GERALDINE KROGER, ETC.,

Appellee,

vs.

OWEN EQUIPMENT & ERECTION CO., ETC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly divided Court.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 16, 1977

APPENDIX C

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS)

A F F I D A V I T

Affiant, being duly sworn on oath deposes and states as follows:

1. That he is an attorney associated with the law firm of Swarr, May, Smith & Andersen, 3535 Harney Street, Omaha, Nebraska. That said firm represents Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. (during the period of the latter's corporate existence) on a regular basis. That during 1972 and 1973 Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. were served with summons in a case in the United States District Court for the District of Nebraska entitled Geraldine Kroger v. Omaha Public Power District, case number 72-0-481. That defense of any claims made against the above two parties was immediately turned over to the parties' liability carrier. The carrier employed the law offices of Emil F. Sodoro to represent the parties.

2. That the undersigned saw to it that all information, documents and records of the parties requested by the carrier or its attorneys was provided. Other than providing such documents, being present at conferences, depositions of the employees of the parties, and at trial, our firm was not involved in the above-captioned litigation, nor familiar with the progression of said litigation.

3. On the morning of January 6, 1976, I was informed by Mr. David Johnson that trial was to commence at 1:30 P.M. of that day. During the noon hour of January 6, 1976, another lawyer in the firm and I were discussing the case in a conversational manner when he inquired of me what the basis of federal jurisdiction was and where Paxton & Vierling Steel Co.'s principal place of business was. He was interested in that he was in the process of commencing suit in federal court on the client's behalf. This conversation aroused my curiosity concerning the Kroger case. Upon my return to the office, I examined our firm file to determine whether plaintiff was an Iowa or Nebraska resident. I discovered plaintiff was an Iowa resident. I attempted to call Mr. Johnson but could not reach him.

4. Since someone from the firm had been asked by the client to observe the trial, I went to the courthouse that afternoon and arrived during voir dire examination. After selection of the jury, there was a recess. During the recess, I informed Mr. Johnson that it appeared to me that there was no jurisdiction because in my view Owen Equipment and Erection Co. had its principal place of business in Carter Lake, Iowa. Mr. Johnson stated that that fact had never occurred to him. I suggested he should apprise the court of that possibility. Mr. Johnson stated he would check it out first.

5. The following morning, I was present in Mr. Johnson's office prior to trial. Mr. Johnson was interviewing Mr. David Morrow. After the interview was completed, we again discussed the question of jurisdiction. Prior to leaving Mr. Johnson's office, we reviewed the pleadings and it appeared to us from the pleadings that there had never been complete diversity. Mr. Johnson instructed a law clerk to research the question and submit a brief to Mr. Johnson as quickly as possible.

Further Affiant saith not.

Robert J. Barber

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES DEC. 29, 1981 STATE OF NEBRASKA

Subscribed and sworn to before me this 29th day of June,

Julie A. Troshynski

STATE OF NEBRASKA)
) ss AFFIDAVIT
COUNTY OF DOUGLAS)

DAVID A. JOHNSON, of lawful age, being first duly sworn on oath, deposes and says:

1. That he is associated with the law firm of Emil F. Sodoro, P.C., the firm that represented Owen Equipment and Erection Company in this action. The litigation file was assigned to this affiant on or about November, 1973, and this affiant was actively involved as attorney for the said Owen from that time through trial.

2. This affiant has carefully reviewed the opinion of this court filed June 21, 1977, particularly in light of this court's finding that defendant engaged in "subtle and adroit pleading", that defendant "connived for himself an unfair advantage" and that the question of the citizenship of Owen had been "concealed" for some two years after the filing of the Amended Complaint. This affiant adamantly denies that any of the above findings by this court are true.

3. This affiant further states that he never engaged in any intentional concealment of the citizenship of Owen. That he is unaware of anyone associated or employed by defendant or any of defendant's representatives or anyone, for that matter, who intentionally concealed the citizenship of Owen at any time before trial.

4. This affiant is unaware of the issue ever being discussed, communicated, alluded to, or thought of by anyone until the second day of trial when Mr. Robert Becker, corporate counsel for Owen, mentioned the question to this affiant. This affiant had the question researched and upon affirmation that this was, in fact, a viable issue it was presented to the court during trial.

Further affiant saith not.

David A. Johnson

Subscribed and sworn to before me this 29th day of June, 1977.

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES APR. 24, 1978 STATE OF NEBRASKA

Julie A. Troshynski